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***In the Matter of*:**

CASE NO. 2001-LHC-2106
OWCP NO. 18-60310

RICHARD C. BROWN,
Claimant,

vs.

LONG BEACH CONTAINER,
Employer,
and

SIGNAL MUTUAL INDEMNITY ASSOCIATION,
Carrier.

Appearances:

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Before: Anne Beytin Torkington
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This case involves a claim arising under the Longshore and Harbor Workers' Compensation Act, as amended (hereinafter "the Act" or "the Longshore Act"), 33 U.S.C. § 901 *et seq.* A formal hearing was held in Long Beach, California on January 18, 2002, in which all parties were represented by counsel and the following exhibits were admitted into evidence: Administrative Law Judge's Exhibits 1, and 2 ("ALJX-1" and "ALJX-2")[1], Claimant's Exhibits ("CX") 1 through 52; and Employer/Carrier's Exhibits ("RX") 1 through 18. Tr.10-18.[2] The parties agreed that the deposition of Claimant's expert witness, Dr. London would be taken post-trial. This Court received the post-trial deposition of Dr. James T. London on May 9, 2002. This exhibit is hereby admitted into evidence as CX-53.

On May 16, 2002, Claimant submitted his Post-Hearing Argument. On May 17, 2002, Employer submitted its Post-Hearing Argument. These are hereby admitted as Administrative Law Judge's Exhibits 4 and 5.[3]

Stipulations: The parties agreed to the following stipulations:

1. The parties are subject to the Act;

2. Claimant and Employer were in an employer-employee relationship at the time the injury occurred;

3. The injury to Claimant's lower back, sustained on June 19, 1995, in Long Beach, California, arose out of and in the course of employment.

4. Claimant filed a timely claim for compensation;

5. Employer had timely notice of the injury;

6. Claimant's average weekly wage at the time of injury was $1,411.55;

7. Claimant returned to his former job as a UTR operator on February 23, 1997;[4]

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[1] Administrative Law Judge's Exhibits were Claimant's Pre-Trial Statement ("ALJX-1"), and Employer/Carrier's Pre-Trial Statement ("ALJX-2"). See Transcript, ("Tr.") at 8.

[2]Hereinafter Employer/Carrier will be referred to simply as Employer.

[3]ALJX-4 is Claimant's Post-Hearing Argument, ALJX-5 is Employer's Post-Hearing Argument.

[4]A UTR driver is a "yard hustler." Claimant explained that the job entails taking containers to and from the ship by use of a chassis or "bombcart," a truck-type vehicle. Tr.25.

8. Claimant reached maximum medical improvement on April 22, 1997;

9. Employer voluntarily paid compensation for temporary total disability from June 20, 1995, through September 29, 1995, and from July 31, 1996, through March 4, 1997, at the rate of $760.92;

10. Since returning to work, Claimant has not worked the following periods, the reasons for which are undisputed: From April 2, 1998, through May 31, 1998, due to a gall bladder operation; From December 21, 1998, through January 31, 1999, due to a hiatal hernia operation; from May 14, 2000, through June 7, 2000, due to a ventral hernia operation;

11. Since returning to work, Claimant has not worked the following periods, the reason for which is disputed by the parties: from May 1, 1999, through May 22, 1999; from August 29, 1999, through October 17, 1999, except that Claimant did work on September 21, 1999, and October 8, 1999, during that period; from February 14, 2001, through April 10, 2001;

12. Employer has paid for medical services under Section 7 of the Act and does not dispute entitlement;

13. Employer is not seeking Section 8(f) relief;

14. Employer is entitled to a credit of $1,087.35 under Section 14(j) for benefits paid from February 23, 1997, through March 4, 1997.

The Court accepts all of the foregoing stipulations as they are supported by substantial evidence of record. See *Phelps v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 325, 327 (1984); *Huneycutt v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 142, 144 fn. 2 (1985).

Issues in Dispute:

1. What is the nature and extent of Claimant's disability, specifically, has Claimant suffered a wage loss secondary to the injury since he returned to his prior job?

2. Is Claimant entitled to attorney's fees and costs?

SUMMARY OF DECISION

Claimant's absences from work, except for a one-week period in February 2001, were not related to his low back injury. These periods of absence from work shall not be factored into a calculation of Claimant's post-injury wages. Claimant has a post-injury average weekly wage of $1,805.76. He has therefore not suffered a loss in earning capacity and is no longer disabled under the Act. Claimant is thus not entitled to benefits for his injury. Claimant has shown that there is a substantial likelihood that his injury will cause diminished capacity in the future. He is therefore entitled to a *de minimis* award. Claimant is entitled to attorney's fees and costs related to this issue.

SUMMARY OF EVIDENCE

Claimant's Testimony:

Claimant, Richard Carl Brown testified on his own behalf. He is 57 years old. Claimant completed tenth grade at San Pedro High School in Washougal, Washington. Claimant can read and write, but not one hundred percent. He has dyslexia. Claimant summarized his work experience prior to becoming a longshoreman. He worked as a dishwasher, then as a warehouseman, stacking pallets. From there, he went to automotive work and then to custom tile work. Tr.23-24.

Claimant began working as a casual longshoreman in 1979-1980. He took jobs as a hole man, lasher, and warehouseman, all of which are physical jobs. He has also worked as a dock boss, hatch boss, and forklift operator. He first worked as a UTR driver in 1980. Claimant described the physical requirements of a UTR driver. It involves bending to get to the air hoses and hooking them to the chassis, climbing in and out of the cab, and sitting. Claimant has performed this job "many thousands of times." Tr.25-26.

Claimant sustained an injury on June 19, 1995, while working as a UTR operator. He was working at Long Beach, Dock 10, at the time. He was driving his "bombcart"[5] around the yard when he went over a speed bump. He was bounced around, and "was whiplashed [sic]." Claimant testified that he might have hit his head on the cab. Claimant felt symptoms immediately upon impact. Claimant stated that "my back right had broke [sic], and I seen stars." This was his lower back. Claimant kept working after the incident. As the shift progressed, Claimant's symptoms worsened. Tr.27-28.

Claimant reported the injury to the "sup of cargo [sic]." He told Claimant to come back after lunch and see the dock boss, which Claimant did. Claimant was given a doctor's slip and reported to San Pedro Care Station. He was told that Dr. London was the company doctor, and would he mind going to see him. Claimant agreed to do so. Dr. London sent Claimant to therapy, which hurt.

[5]A bombcart is the same as a chassis, but much bigger. It holds 45-foot containers. Tr.27.

Dr. London recommended "ice, different things, and it just didn't do nothing." Eventually, Dr. London sent Claimant for an MRI scan. Claimant recalled that he was told that his "hernia had ruptured [sic]. It was completely out of the disc. My spine was touching each other, and it was up against the sciatic nerve, and he said that it would go back in." Tr.29-30.

Claimant was initially off work for three and a half months following the injury. Claimant was paid compensation during this time, but, he opined, not enough to pay his rent and buy food. He returned to work because he had to pay his bills. His symptoms remained the same as before he returned to work. "I was really hurting a lot." Claimant continued to see Dr. London, and was treated at Palos Verdes Rehabilitation, "getting tests, and exercises." Claimant was taking Vicodin[6] and Codeine 3s,[7] and then switched to Vicodin 75s and Codeine 4s, "because the 3s didn't work." The 4s worked better, but the pain was still there. Tr.31. Claimant stopped taking medication "about a year and a half ago" because he became immune to it. It was no longer relieving pain because he had taken too much. Tr.43.

Dr. London eventually recommended that Claimant see Dr. Nabavi, a neurosurgeon. Dr. Nabavi told Claimant that he needed immediate surgery. He could not believe Claimant had waited that long. Claimant was off work for seven and a half months following the surgery. Tr.32. Claimant testified that on February 23, 1997, both Dr. Nabavi and Dr. London released him to return to work. Claimant went back to his usual and customary work of driving a UTR. He stated that he was "a little bit more cautious and a little bit more careful" upon returning to work. Claimant continued taking medication. Tr.33-34. On cross-examination, Claimant testified that although Dr. Nabavi had not told him that he was releasing him to full time work, Dr. Nabavi did not restrict the amount of hours Claimant could work. Nor did Dr. London. Tr.59.

Claimant was elevated to a class A longshore worker sometime following his surgery. This change in status gave him the opportunity to work at "better terminals where the road was actually much better to ride." He was given UTRs with better suspension. Claimant testified that he was also eligible for top handler jobs at that time.[8] Claimant stated that the pay for a top handler operator is "a little bit better" than that of a UTR driver, because it requires more skill. Claimant continued that if he takes a "crane rated" top handler job, he also receives "crane pay."[9] Tr.35-36. Claimant testified that since his injury, he prefers to take top handler jobs rather than UTR jobs because they are easier on his back. When he drives a UTR he tries to get jobs in yards with newer UTRs with

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[6]A narcotic-analgesic combination, prescribed for mild to moderate pain relief. *The Pill Book*, 7th ed., 1996, p.877-878.

[7]A narcotic pain reliever and cough suppressant, prescribed for the relief of moderate pain and cough suppression. *The Pill Book*, 7th ed., 1996, p.256.

[8]A top handler is a "machine" that picks the containers up off the chassis of the UTRs, and loads them onto the ships. Tr.35-36.

[9]Claimant was paid extra for these shifts. He did not testify how much extra. Tr.36.

better suspension. Tr.41.

Claimant testified that after the accident he tried to work the night shift as much as possible. He preferred working nights because he is a night person, the pay is better, and there are fewer supervisors around during the night shift. Claimant described the two night shifts in the yard. The "second shift" is a full eight-hour shift that customarily starts at six p.m. The shift is shorter if the job is as a top handler operator rather than a UTR driver. The reason for this is that as a top handler, "usually you have a partner, and he works half of it, and you work the other half, except for one. Out of five [top handlers] two of them make a deal; one them [sic] have to stay all night." In this instance a worker could stay home, and still get paid for an eight-hour shift. The "third shift" is a four-and-a-half to five-hour shift that begins at three a.m., but the worker is paid for a full eight hours. Tr.37-41. Claimant testified that since 2001, he has been working the third shift, which is why his hours are much lower. He worked "probably as many shifts, but the hours don't show as the same." This shift is easier on his back. "It just doesn't make sense" to work "a couple extra hours for the same amount of pay." Tr.42.[10] On re-direct, Claimant stated that he could make approximately $80 more per shift if he worked the second shift rather than the third shift. The second shift also paid much more than an eight-hour day shift. He does not work the second shift instead of the third because it's "too long, and besides I'd be hurting too much." Tr.82-83.

Claimant testified that there had been days since the operation when he did not report to work because his back pain was intolerable. He stated that at these times he tried to reach Dr. London, but "his secretaries would give [him] the runaround." Claimant testified that there was a period a year ago, of about a month when he was off work. Claimant told Dr. London that he had not been working. Claimant stated on cross-examination, that he had been off work for approximately two weeks before he saw Dr. London on this occasion. He had tried to get to him earlier but he "couldn't because his secretaries would not pass him to me. I was even at the office, and they would not let me see him because I wasn't scheduled to an appointment since it's an industrial doctor." Tr.63-64. Dr. London ordered another MRI scan, and gave him more medication, but it did not relieve his pain. Tr.44-45. Claimant did not recall Dr. London telling him that he should remain off work, or that he should go back to work either. He did not ask Dr. London for a disability slip, and he was not given one. Tr.65.

When asked about the limitations Dr. London has placed on him, Claimant testified that he has been restricted to lifting twenty-five to thirty pounds. He stated that Dr. London told him not to do jobs that require him to stand for long periods of time because they hurt his back. However, Claimant has no trouble sitting. "As long as I can change position, it's not as bad." Claimant has no trouble with the UTR or top handler position because he sits in a comfortable chair, and is usually able to get up and move around occasionally. Tr.46-47. On cross-examination, Claimant stated that he cannot "do ro-ro's," which is when one uses a UTR to move containers on and off the ship.

[10]On cross-examination, Claimant clarified that he gets paid for five hours, but he is paid "quite a bit" more per hour for the third shift. It equals pay for a regular eight hour shift. He is recorded for working eight hours for the purposes of his 401k, bonuses, and other benefits. Tr.75.

There is too much bumping around involved. This is the only duty of a UTR operator that he cannot perform. Tr.68-69.

Claimant stated he tries to restrict the amount of shifts he works to five or six "third shifts" per week. Occasionally, he works less because he is "hurting." This happens "[a] couple times" a month. Claimant estimated that he works about a third fewer shifts than he used to because of his pain. Tr.47.[11] He explained that he used to work seven days, and eight to ten shifts a week. Tr.48. Now, there are weeks when Claimant works less than five or six days a week. The reason for this is that he turns down jobs at yards that he knows are "really bumpy" and will cause him back pain. Claimant stated that he is always at work if he is physically able. Tr.52-53.

Regarding the three non-industrial surgeries Claimant had, he testified that he returned to work as soon as the doctors allowed. He further stated that he had no residual pain or problems, nor did he ever restrict his job selection due to those surgeries. Tr.54-55. On cross-examination, Claimant testified that no doctor had taken him off of work because of his back during these three periods. Claimant could not recall why he missed work from May 1 through May 22, 1999, but no doctor had taken him off work because of his back. He testified further that he had been off work from August 29, 1999, through October 17, 1999, because his back flared up.[12] Claimant did not seek treatment or a doctor's opinion during this flare-up. He reasoned, "Why? Was someone going to give me help?" Claimant testified that from February 14, 2001 through April 10, 2001 Claimant suffered from another flare-up. This time he did seek treatment from Dr. London. His reason for doing so on this occasion, but not previously, was that "I was hurting more because I hadn't been on pills for a long time, and I was trying to get something." Tr.59-63.

Claimant described his symptoms related to the injury. He stated that he suffers from numbness in his buttocks, a tingling and burning sensation, as well as a "dead feeling" in his left leg. These symptoms have been present, "up and down" since the injury. Tr.56. Claimant testified that when his symptoms are worse, he is unable to work. He feels that his condition is getting worse over time. Tr.57.

Claimant last saw Dr. London in 2001. At that time, Dr. London told Claimant he had an "open door policy" with him. Claimant could see Dr. London any time he felt he needed to. Claimant has not been back because "[t]here's nothing he can do. There's no medicine that I need to take. Is he going to operate on me again? No, I'm not going to let him." Tr.57. On cross-examination, Claimant admitted that since he returned to work in February 1997, he has not asked any doctor to take him off work because of his back pain. He stated that Dr. London knows he is

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[11]Claimant testified to working jobs since his injury that did not require him to actually work, but he was paid for anyway. As a linesman, he only actually worked twenty minutes out of every two hours. There were also times "where we were put on payroll and we weren't there because we were off work." Tr.48-50.

[12]Claimant did work on two separate days during this time period. Tr.61.

in pain, but Claimant has not complained about it. He asserted that if he asked Dr. London to take him off work, "he'd probably take me off." Tr.65.

On cross-examination, Claimant testified that there was a period of a year and a half during which he did not seek any treatment for his back. He returned to see Dr. London on September 8, 2000. Dr. London told Claimant that his condition had not changed. Dr. London did not recommend any treatment at that time. Claimant denied returning to see Dr. London at that time because he had his deposition taken by Employer three weeks prior. He returned because his back flared up "real bad." Tr.66-67.

On cross-examination, Claimant testified that in the last year and a half, he has been diagnosed with diabetes. He is not insulin dependent, but he does take medication for his condition. Claimant testified that he has never been told that the diabetes could be responsible for his left leg symptoms. Tr.58-59.

Dr. James T. London:

Dr. James T. London, a board certified orthopedic surgeon, testified on behalf of Claimant, by Post-Hearing deposition. See Curriculum Vitae of Dr. London, CX-53, Exhibit 1, p.1-6. The deposition took place on April 2, 2002, in Dr. London's offices in Long Beach, California. CX-53, p.5.

Dr. London is Claimant's treating physician. He first examined Claimant on July 7, 1995. At that time, Claimant was using a cane to walk. His gait was unsteady, and he was bent forward at the waist. Claimant had limited range of motion in the lumbar spine. Dr. London found that "[Claimant's] deep tendon reflex at the left ankle was only trace, compared to two on the right, and his straight leg raising test was positive on the left at seventy degrees." The left tendon reflex was significant in that it was consistent with an S1 nerve root problem, "and given his history and the positive straight leg raising test, I was concerned that he had a herniated lumbar disc with S1 nerve root impingement." CX-53, p.6-7.

Dr. London recommended Claimant rest, remain out of work, and undergo an MRI scan. Claimant underwent an MRI on July 26, 1995. That scan revealed a disc herniation on the left side at L5-S1, displacing the left S1 nerve root. Dr. London recommended that Claimant remain on temporary total disability, remain at bed rest, take analgesic medication, and begin a physical therapy treatment program. Dr. London discontinued the physical therapy program on September 29, 1995, as Claimant had improved somewhat, although he was still symptomatic. Dr. London felt Claimant could continue his physical therapy at home on his own. CX-53, p.7-8.

According to his records, Claimant returned to work on September 30, 1995, without restriction. Claimant did inform Dr. London that he would pick and choose jobs to avoid any that might aggravate his condition. Dr. London testified that Claimant's condition changed on April 1,

1996. Dr. London saw Claimant at that time, and Claimant complained that his pain had become constant, radiating down the left lower extremity, with some numbness in the left leg. Dr. London sent Claimant to see Dr. Nabavi for a neurosurgical consultation. CX-53, p.8-9.

Dr. Nabavi recommended a lumbar laminectomy after examining Claimant on June 11, 1996. The surgery was performed on July 31, 1996. At the time of surgery, the findings were an annular ligament rupture at L5-S1 on the left side, impinging on the left S1 nerve root. The herniated piece of disc was removed, as was the soft central portion of the L5-S1 disc. Fusion was then performed at the L5-S1 level. Dr. London opined that Claimant made a good recovery from the surgery. Claimant was started on an exercise program and "some therapy treatments." He returned to full duty as a UTR driver, without restriction, on February 23, 1997. Claimant again indicated to Dr. London that he would pick and choose jobs which would not aggravate his condition. CX-53, p.9-11. On cross-examination, Dr. London clarified that this was not included in his reports, but he did recall having discussions with Claimant about what jobs he was working. CX-53, p.26.

Dr. London declared Claimant permanent and stationary on April 22, 1997, and placed the following work restrictions on him: no heavy lifting or carrying, no prolonged standing in one place without an option to walk or move around, no prolonged sitting in one place without an option to change position, and no repeated bending. Dr. London opined that these work restrictions still apply. Dr. London further stated that although it is not contained in the permanent and stationary report, he recommended that Claimant have access to medical care on an as-needed basis, as Claimant was still having symptoms in his low back and left lower extremity at that time. CX-53, p.12-13. On cross-examination, Dr. London opined that Claimant is still permanent and stationary. CX-53, p.30.

Dr. London continued to treat Claimant over the next few years. On October 1, 1996, Dr. London performed another MRI scan of the lumbar spine "with gadolinium."[13] The study showed fiber scars surrounding the left S1 nerve root. Claimant next had an MRI scan on May 20, 1998. This scan showed degenerative disc disease at L5 with a mild diffuse broad-base central bulge with scar tissue from the prior surgery. This indicated to Dr. London that there had been no new changes, and that Claimant would require ongoing monitoring. CX-53, p. 14-16. There was an additional study on April 2, 2001. The results were some facet joint arthritic changes and disc space narrowing. There was a three-millimeter disc bulge and narrowing of the neuroforamina at both sides at L5-S1. There was also a three-millimeter posterior disc bulge at L3-4, and facet joint arthritis at L4-5. Dr. London opined that the facet joint arthritic changes at L5-S1 were reasonably related to Claimant's injury and subsequent surgery. He further opined that the changes at the L3-4 and L4-5 level were degenerative changes, accelerated by the surgery.[14] Dr. London again opined that Claimant would

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[13]Gadolinium is a contrast material that helps distinguish between scar tissue due to prior surgery, and a recurrent disc problem. CX-53, p.14.

[14]Dr. London explained, "[w]hen there's less mobility at one segment, it can transfer some of the normal stresses onto adjacent segments. He may have had degeneration at those levels, even absent his injury and surgery; but the injury and the subsequent surgery would probably have accelerated those

require ongoing medical monitoring. CX-53, p.16-18. On cross-examination, Dr. London opined that Claimant would require ongoing medical monitoring as long as he is working. CX-53, p.27.

Dr. London testified that Claimant continued to complain of exacerbations and flare-ups of symptoms, usually related to activity, "but not always," with radiation of pain from Claimant's lower back "down the left lower extremity and the S1 nerve root distribution." Dr. London did not find these complaints unusual, as Claimant had never been completely symptom-free since the surgery. Scar tissue could cause ongoing symptoms, and flare-ups. CX-53, p.19.

Dr. London could not recall any specific date, but he testified that he was aware that Claimant "has had times after flare-ups where he has not worked for a period of days." He was made aware of these occasions retrospectively. CX-53, p.27, 31. Dr. London found this decision not to work to be a reasonable one. Dr. London found it reasonable that Claimant continue to work driving jobs, as they are the least stressing on his back. He further found it reasonable that Claimant work fewer hours. Dr. London stated that he would not put a restriction on Claimant as to how many hours Claimant work in a given week, but he stated that "I think if he has a flare-up, he may have to have times where he would be away from work for a period of days." CX-53, p.20-22. Dr, London testified on cross-examination that he could not recall placing Claimant on temporary total disability at any time following February 23, 1997, the date he declared Claimant permanent and stationary. CX-53, p.27-29.

Dr. London testified on cross-examination that he was aware that Claimant had diabetes. Dr. London agreed that diabetes can sometimes cause numbing or tingling sensations in the lower extremities. He could not completely rule out diabetes as a cause for Claimant's symptoms, but he thought it improbable, "because of the temporal sequence of the development of [Claimant's] symptoms," as well as the dermatomal pattern consistent with a herniated disc, and the presence of symptoms in only one extremity, where symptoms of diabetes tend to be bilaterally symmetrical. CX-53, p.29-30.

ANALYSIS

Claimant asserts that he has sustained a loss of wage-earning capacity due to his industrial injury. He alleges that his post-injury average weekly wage ("AWW") must be calculated including the three occasions where he did not work due to his back pain. When calculated in this manner, Claimant's average weekly wage is substantially lower than it was prior to the injury, and Claimant has sustained a loss of wage-earning capacity. Claimant is therefore entitled to compensation under the Act. In the alternative, Claimant argues that he is entitled to a *de minimis* award of benefits, because there is a substantial likelihood that this injury will cause diminished capacity under future conditions.

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degenerative processes." CX-53, p.18.

Employer argues that Claimant has not sustained a loss of wage-earning capacity, and is therefore not entitled to ongoing benefits. When calculating Claimant's average weekly wage, Employer argues that the three periods of unexplained absence must be excluded, as there is no proof that these absences were due to Claimant's low back injury. Employer further argues that there is no substantial likelihood of future diminished capacity, and thus Claimant is not entitled to a *de minimis* award.

I. Nature and Extent of Claimant's Injuries:

The burden of proving the nature and extent of disability rests with the claimant. *Trask v. Lockheed Shipbuilding Constr. Co.*, 17 BRBS 56, 58 (1980). Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (partial or total). The Act defines disability as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, the claimant must demonstrate an economic loss in conjunction with a physical or psychological impairment in order to receive a disability award. *Sproull v. Stevedoring Service of America*, 25 BRBS 100, 110 (1991). Thus, a disability requires a causal connection between a worker's physical injury and his inability to obtain work. If the claimant shows he cannot return to his prior job, it is the employer's burden to show that suitable alternate employment exists which he can perform. Under this standard, a claimant may be found to have sustained no loss, a total loss or a partial loss of his wage-earning capacity. There is no disagreement that Claimant has returned to his prior job as a UTR operator.[15] Thus the issue is whether Claimant has suffered a partial loss of wage-earning capacity since the injury to his low back.

A. Loss of Wage Earning Capacity:

Section 8(h) of the Act provides:

> (h) The wage-earning capacity of an injured employee in cases of partial disability under subdivision (c)(21) of this section or under subdivision (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity. . .

Section 8(h) mandates a two-part analysis in order to determine the claimant's post-injury wage-earning capacity. *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649, 660 (1979). The first inquiry requires the judge to determine whether the claimant's actual post-injury wages reasonably and fairly represent his wage-earning capacity. *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 796, 16 BRBS 56, 64 (CRT) (D.C. Cir. 1984). If the actual wages are unrepresentative of the claimant's wage-earning capacity, the second inquiry requires that the judge arrive at a dollar amount which fairly and reasonably represents the claimant's wage-earning capacity. Id. at 796-97,

[15]See Stipulation #7, p.2.

16 BRBS at 64. If the claimant's actual wages are representative of his wage-earning capacity, the second inquiry need not be made. *Devillier*, 10 BRBS at 660.

The party that contends that the claimant's actual wages are not representative of his wage-earning capacity has the burden of establishing an alternative reasonable wage-earning capacity. *See Grage v. J.M. Martinac Shipbuilding*, 21 BRBS 66, 69 (1988), *aff'd sub nom. J.M. Martinac Shipbuilding v. Director, OWCP*, 900 F.2d 180, 23 BRBS 127 (CRT) (9th Cir. 1990); *Misho v. Dillingham Marine & Mfg.*, 17 BRBS 188, 190 (1985); *Spencer v. Baker Agric. Co.*, 16 BRBS 205, 208 (1984); *Burch v. Superior Oil Co.*, 15 BRBS 423, 427 (1983); *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691, 693 (1980).

The ALJ must establish a precise dollar amount for post-injury wage-earning capacity. *La Faille v. Benefits Review Bd.*, 884 F.2d 54, 61, 22 BRBS 108, 118 (CRT) (2d Cir. 1989); *Harrison v. Todd Pac. Shipyards Corp.*, 21 BRBS 339, 345-46 (1988); *Cook v. Seattle Stevedore Co.*, 21 BRBS 4, 7 (1988); *Guthrie v. Holmes & Narver, Inc.* 30 BRBS 48, 52 (1996) rev'd on other grounds sub nom. *The Wausau Ins. Companies v. Director, OWCP*, 114 F.3d 120, 31 BRBS 41 (CRT) (9th Cir. 1997) (affirming an ALJ's use of a night shift job to establish a wage differential for determination of the claimant's post-injury wage earning capacity). The Board has recently held, in conformance with *Edwards* and *Walker,* that a judge should look to both the alternate employment advanced by the employer and any other suitable jobs which the employer has not raised, yet the claimant is capable of performing, in determining the post-injury wage-earning capacity. *Mangaliman v. Lockheed Shipbuilding Company*, 30 BRBS 39, 43, (1996).

Furthermore, "[a] disabled worker's post-injury earnings can only 'fairly and reasonably represent his wage-earning capacity,' if they have been converted to their equivalent at the time of injury." *La Faille v. Benefits Review Bd.*, 884 F.2d 54, 61, 22 BRBS 108, 120 (CRT) (2d Cir. 1989). *See also White v. Bath Iron Works Corp.*, 812 F.2d 33, 19 BRBS 70 (CRT) (1st Cir. 1987); *Sproull v. Stevedoring Serv. of America*, 86 F.3d 895, 899 (9th Cir. 1996). This conversion ensures that the calculation of the lost wage-earning capacity is not distorted by a general inflation or depression. *Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297, 298 (1984). The post-injury wages should be adjusted using the percent change in the National Average Weekly Wage. *Quan v. Marine Power & Equipment Company,* 30 BRBS 124 (1996).

In the instant case, neither party is arguing that Claimant's post-injury earnings do not reasonably reflect his current wage-earning capacity. Both parties urge the court to find that Claimant's post-injury earnings *do* reflect his wage-earning capacity. The disagreement is in the calculation of Claimant's post-injury earnings. Claimant argues that he was absent from work due to flare-ups caused by his back injury, and that these time periods should be factored in when calculating Claimant's post-injury wage-earning capacity. By Claimant's calculations, his AWW following the injury does not equal Claimant's pre-injury AWW of $1,411.55.[16]

[16]Claimant fails to give the court an exact figure, but urges the court to find Claimant is entitled to "a loss not less than $300.00 per week for this period, yielding a compensation rate of at least $200.00 per

Employer argues that these periods of time off work were not related to Claimant's injury, and should not be considered when calculating Claimant's post-injury wage earning-capacity. By Employer's calculations, Claimant had a post-injury wage earning capacity of $1,818.00 per week. Thus, Claimant has not suffered any economic loss, and is therefore not disabled under the Act. The undersigned agrees with Employer, to the extent that the periods of absence from May 1, 1999 through May 22, 1999, and August 29, 1999 through October 17, 1999, are not related to Claimant's low back injury.[17]

I do find that Claimant's absence from February 14, 2001 through April 10, 2001, may be related to his back injury. I do not, however, think it reasonable for Claimant to have missed eight weeks of work for this flare-up. Based upon the testimony of Dr. London, as well as the medical records, I find the it would be reasonable for Claimant to have missed one week of work during this period. Thus, this one week should be considered when calculating Claimant's post-injury wage earning capacity. Factoring in this extra week, however, does not change the result that Claimant's post-injury wages are higher than his pre-injury wages. Thus, Claimant has not suffered an economic loss due to his injury, and is therefore not disabled under the Act.

1. May 1, 1999 Through May 22, 1999:

Claimant asserts that the time missed from work between May 1, 1999 and May 22, 1999 was injury-related, and should be factored into any calculation of Claimant's post-injury wage-earning capacity. The evidence and testimony in this case does not support this conclusion. Claimant's testimony was that he could not recall why he missed work during this period. In fact, he could not think of any reason "at the moment" why he might have missed work during this period. He further testified that he had not been taken off work by Dr. London, or any other physician at this time. Tr.60-61. Dr. London testified that he did not recall examining Claimant during this period, nor did he take Claimant off work because of pain stemming from his back injury. CX-53, p.27-29. Furthermore, Claimant had been to see Dr. London as recently as March 12, 1999, and had been to see him the previous month as well. See CX-31, 32. This evidence appears to contradict Claimant's testimony that he was unable to reach Dr. London when he needed to. He was able to see him regularly prior to this episode. If Claimant were experiencing such pain that he could not work for three weeks, it is difficult to believe that he would not have reported this to his treating doctor, whom he had been seeing on a regular basis just two months prior. Thus, I find that there is insufficient proof that this period of missed work was due to Claimant's back injury.

2. August 29, 1999 Through October 17, 1999:

Claimant asserts that the time missed from work between August 29, 1999 through October 17, 1999 was injury-related, and should be factored into any calculation of Claimant's post-injury

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week." ALJX-3, p.7-8. The undersigned does not know how this figure was arrived at.

[17]Excluding September 21, 1999, and October 8, 1999. See stipulation #11 at page 3.

wage-earning capacity. Again, the evidence and testimony does not support this conclusion. While Claimant testified that on this occasion he did recall that he missed work due to a flare-up of his back injury, Tr.61, there is no objective medical evidence to corroborate this assertion. Claimant stated that he did not seek medical treatment for this flare-up because he did not see any point in it. He did not think he would get any help. Again, the medical records indicate that Claimant had been seeing Dr. London regularly throughout 1998 and early 1999. He saw Dr. London on a fairly regular basis in 2001. See CX-25 to 32, and 35 to 38. There is no explanation as to why Claimant felt at this time that Dr. London could not help him with his pain.

Dr. London testified that he did not treat Claimant during this period. Dr. London testified that he was aware that Claimant had at times, "not worked for a period of days," but Dr. London did not at any time take Claimant off of work himself. CX-53, p.27-31. Dr. London suggested that a few days off might be reasonable, given Claimant's condition, but close to eight weeks is significantly more than a few days. It is not reasonable that an individual should remain off work for an extended period of time such as this, without seeking a doctor's approval. Therefore I find that there is insufficient proof that Claimant's extended absence between August 29 and October 17, 1999, was injury-related.

3. February 14, 2001 Through April 10, 2001:

Finally, Claimant urges the court to find that he was absent from work from February 14, 2001, through April 10, 2001, due to a flare-up in his back condition. The evidence and testimony corroborates Claimant's contention that he may have suffered a flare-up at this time. However, it does not show that this flare-up warranted an almost eight-week absence from work. On this occasion, Claimant did seek medical help. He saw Dr. London on March 9, 2001, close to a month after he asserts the flare-up began. Claimant explained that he attempted to see Dr. London, but was thwarted by his staff. Dr. London testified that he did examine Claimant, and was informed by him that he had been off work due to his pain. Dr. London's report, dated March 11, 2001, corroborates this testimony. Dr. London reported that Claimant had been off work and taking Vicodin for the pain. The report does not indicate how long Claimant had been off work, nor does it recommend that Claimant remain off work. In fact, Dr. London's recommendations at the time were to continue stretching exercises and take Vicodin for the pain. He would re-examine Claimant in six weeks. CX-35, p.167. Claimant did not return to work at this time, of his own volition.

Claimant next saw Dr. London a month later, on April 9, 2001. He was still off work, however, Dr. London's report does not mention this fact. Claimant reported that his pain was worse since the last examination. Dr. London reviewed an MRI scan, which he testified showed degenerative changes related to the surgery and injury. CX-53, p.16-18. Dr. London's

recommendations were Vioxx,[18] Darvocet[19] for pain and a re-examination in six weeks. Dr. London did not recommend Claimant stay off work. He did not place Claimant on temporary total disability. CX-36, p.110. Claimant did not ask Dr. London to place him on temporary total disability. Tr.65. In fact, Claimant returned to work of his own accord, two days later. Claimant's complaints to Dr. London that his pain had worsened since March are inconsistent with his return to work two days later. Furthermore, Dr. London testified that it would be reasonable for Claimant to miss work for a period of a few days. Dr. London, at no time, testified that it would be reasonable for Claimant to miss eight weeks of work. CX-53, p.20-22.

The undersigned does not doubt that Claimant's condition could and did cause intermittent flare-ups, however, I do find it unreasonable for Claimant to decide independently to remain off work for eight weeks without obtaining clearance from his doctor to do so. If Claimant worked in any other industry, or for a different employer, he would lose his job for such conduct. See *Wallace v. C & P Telephone Co.*, 11 BRBS 826 (termination for prolonged absences without a doctor's excuse not a violation of § 48(a) of the Act); *Dance v. Newport News Shipbuilding & Dry Dock Co.*, 29 BRBS 768 (ALJ), *Strickland v. Newport News Shipbuilding & Dry Dock Co.*, 34 BRBS 604 (ALJ) (requirement of doctor's excuse for prolonged absence part of collective bargaining agreement. No discriminatory termination under § 48(a)). Thus, based upon Dr. London's testimony that a period of days would be reasonable, I find that Claimant is entitled to one week for this episode. This one week will be factored in to the calculation of Claimant's post-injury wage earning capacity.

Based upon the Pacific Maritime Association ("PMA") records from April 22, 1997, through 2001, Claimant's post-injury wage earning capacity is greater than his pre-injury wage earning capacity. CX-2, p.2-25. Claimant has a current AWW of $1,805.76.[20] Taking inflation into account, this amounts to the equivalent of $1,513.03 at the time of his industrial injury.[21] While this average is just slightly more than Claimant's pre-injury AWW, the undersigned finds that Claimant did not suffer any economic loss due to his back injury. A careful analysis of Claimant's PMA records indicates that he earned much more than his pre-injury wages in the years 1997, 1998 and 2000. Claimant worked over 2000 hours in both 1997 and 1998. In 2000, Claimant worked fewer hours, but his yearly total was still $78,203.12, much more than he earned pre-injury. In 1999, Claimant's earnings and hours dropped, but Claimant missed approximately fourteen weeks of work due to non-injury related circumstances. At $1,805.76 per week, Claimant would have earned an added

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[18]An anti-inflammatory, prescribed for the relief of symptoms of osteoarthritis, rheumatoid arthritis, and acute pain. *www.vioxx.com.*

[19]An analgesic, prescribed for mild pain relief. *The Pill Book*, 7th ed., 1996, p.956.

[20]$339,186.46 ÷ 1,127 = $300.96 x 6 = $1,805.76 (Claimant's total earnings divided by total days worked, gives his average daily wages. This figure multiplied by 6 days gives Claimant's AWW.)

[21]$391.22 (NAWW '95) x $1,805.76 = 706,449.42 ÷ $466.91 (NAWW '01) = $1,513.03

$25,280.64 in the year 1999. This would have given Claimant a yearly total of $91,741.61.[22]

Claimant testified that he switched to the third shift in 2001, which partially explains his drop in hours worked that year. He was only working five hour shifts, although he was earning the equivalent to an eight-hour shift. Tr.37-42, 75. Claimant chose to work the night shift because he preferred it to the day shift. Claimant testified that he is a night person, the pay was better, and there were fewer supervisors around, so he attempted to work the night shift as much as possible. Tr.37. Claimant worked the third shift because it was easier on his back, and he stated that it just did not make sense to work three extra hours for the same pay. Tr.42. The records indicate that Claimant earned $56,543.61 in 2001. Had Claimant worked the entire year, his earnings would have been greater. In 2001, Claimant missed seven weeks due to non-injury related circumstances. This missed time would have given Claimant another $12,640.32 in wages, for a yearly total of $69,183.93. Thus, 2001 is the only year that Claimant did not earn substantially more than he did before his injury.

Based on the foregoing, I find that Claimant's post-injury wages fairly and accurately represent his post-injury wage earning capacity, and Claimant has not sustained an economic loss due to his back injury. Therefore, Claimant is no longer disabled and is not entitled to compensation under the Act.

B. *De Minimis* Award of Benefits:

As the parties have already stipulated that Claimant suffered a temporary total disability as a result of the June 19, 1995 injury, there is no dispute that Claimant sustained a work-related injury.[23] The undersigned has found that Claimant has had no loss of wage earning capacity due to the industrial accident, and is therefore not entitled to an award of disability benefits. The question remains as to whether the industrial accident could cause a future worsening of his condition, meriting a *de minimis* award of benefits. Claimant argues that his current episodes of low back pain are evidence of a permanent partial disability arising from the 1995 work injury. As a result, Claimant contends that he is entitled to a *de minimis* award as there is substantial potential that this injury will cause diminished capacity under future conditions. Employer asserts that Claimant incurred only a temporary total disability which ceased upon his return to pre-injury employment, and that Claimant's recent pain complaints are merely due to wear and tear.

De minimis awards are appropriate where a claimant has not established a present loss in wage-earning capacity, but has shown by a preponderance of the evidence that there is a significant possibility of diminished capacity under future conditions. See *Metropolitan Stevedore Co., v. Rambo (Rambo II)*, 521 U.S. 121, 31 BRBS 54 (CRT) 1997. There are three conditions that must be satisfied before nominal compensation may be awarded: (1) a continuing disability, (2) no current loss of wage-earning capacity attributable to the subject injury, and (3) a reasonable expectation that

[22] $25,280.64 + $66,460.97 = $91,741.61

[23] See stipulation #3 at page 2, *supra.*

the work-related injury will cause a loss in wage-earning capacity at some future point. *Id.* at 62.

Claimant has easily met the first two conditions for a *de minimis* award. Dr. London testified that although Claimant remains permanent and stationary, he will continue to require medical monitoring, as well as medication and occasional treatment for flare-ups. Claimant will continue to need treatment as long as he continues to work. Dr. London does not foresee lifting Claimant's current work restrictions at a future date. CX-53, p.16-18, 27. There is no evidence to the contrary. Thus, Claimant has a continuing disability, and the first condition is met. As discussed previously, Claimant does not suffer from a loss of wage-earning capacity at this time. Thus the second condition is met. The issue remains, is there a reasonable expectation that Claimant's injury will cause a loss in wage-earning capacity in the future? Based upon the medical records and the testimony of Dr. London, I find that there is such a likelihood. Claimant is therefore entitled to a *de minimis* award.

Dr. London's uncontroverted testimony was that Claimant's low back injury will continue to bother him as long as he is working. Claimant will suffer from flare-ups, and will need continued access to medical care on an as-needed basis. He indicated that Claimant may need to undergo more MRI scans in the future to determine if his condition is worsening. While Claimant is permanent and stationary at the moment, his most recent MRI showed new degenerative changes at not only the L5-S1 level, where the original injury occurred, but also at the L3-4 and L4-5 levels. Dr. London opined that although these degenerative changes may have occurred regardless of the injury and surgery, they have been aggravated and the process of degeneration hastened by Claimant's injury and subsequent surgery. It is logical to believe that this degeneration will continue. I do not doubt that Claimant continues to suffer from pain related to his back injury. As stated previously, my doubt lies in the reasonableness of his independent decision to take himself off work. I find it reasonable to believe that based on his condition and on Dr. London's testimony and the medical records, that Claimant may suffer an economic loss in the future. Therefore, I find that Claimant is entitled to a *de minimis* award.

II. Attorney's Fees and Costs:

Under Section 28 of the Act, a claimant may recover reasonable and necessary attorney's fees and costs associated with the "successful prosecution" of his claim. 33 U.S.C. § 928. Since Claimant has successfully prosecuted his claim for a *de minimis* award for benefits, he is entitled to attorney's fees and costs associated with that claim.

Conclusion

Claimant has failed to sustain his burden in proving that the extended periods of time missed, May 1, 1999 through May 22, 1999, August 29, 1999 through October 17, 1999, and February 14, 2001, through April 10, 2001 were injury-related. Thus 35 2/7 weeks will not be factored into the calculation of Claimant's post-injury wage-earning capacity.

Claimant has successfully proven that one week of absence during February 2001 was related to his back injury, and thus this week will be factored into the calculation of Claimant's post-injury

wage-earning capacity.

Claimant's post-injury wages fairly and accurately reflect Claimant's post-injury wage earning capacity. Claimant had an AWW of $1,805.76 post-injury. He has not sustained an economic loss. Claimant is therefore not entitled to compensation under the Act.

Claimant has successfully proven entitlement to a *de minimis* award for potential future benefits.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, and based upon the entire record, the Court issues the following order:

1. Employer shall pay Claimant $1 per week.

2. All computations are subject to verification by the District Director who in addition shall make all calculations necessary to carry out this Order.

3. Employer shall provide Claimant all the medical care that may in the future be reasonable and necessary for the treatment of the sequelae of the injury to his back.

4. Counsel for Claimant is hereby ordered to prepare an Initial Petition for Fees and Costs and directed to serve such petition on the undersigned and on the counsel for Employer within 21 days of the date this Decision and Order is served. Counsel for Employer shall provide the undersigned and Claimant's counsel with a Statement of Objections to the Initial Petition for Fees and Costs within 21 days of the date the Petition for Fees is served. Within ten calendar days after service of the Statement of Objections, counsel for Claimant shall initiate a verbal discussion with counsel for Employer in an effort to amicably resolve as many of Employer's objections as possible. If the two counsel thereby resolve all of their disputes, they shall promptly file a written notification of such agreement. If the parties fail to amicably resolve all of their disputes within 21 days after service of Employer's Statement of Objections, Claimant's counsel shall prepare a Final Application for Fees and Costs which shall summarize any compromises reached during discussion with counsel for Employer, list those matters on which the parties failed to reach agreement, and specifically set forth the final amounts requested as fees and costs. Such Final Application must be served on the undersigned and on counsel for Employer no later than 30 days after service of Employer's Statement of Objections. Within 14 days after service of the Final Application, Employer shall file a Statement of Final Objections and serve a

copy on counsel for Claimant. No further pleadings will be accepted, unless specifically authorized in advance. For purposes of this paragraph, a document will be considered to have been served on the date it was mailed. Any failure to object will be deemed a waiver and acquiescence.

IT IS SO ORDERED

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ANNE BEYTIN TORKINGTON
Administrative Law Judge

ABT:lc